IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1481

ROBERT V. STOVER, Chief of Police, Albuquerque Police Department, ROY BACA; ROBERT T. POOLE; NANCY KOCH; LOUIS SAAVEDRA; RICHARD VAUGHN, City Commissioners for the City of Albuquerque, all of the above individually and in their official capacity, and HERB SMITH, City Manager, individually and in his official capacity, *Petitioners,*

v.

CHICANO POLICE OFFICER'S ASSOCIATION and SEGILFEREDO SANCHEZ; VINCE VILLANUEVA; DANIEL GARCIA; ARCHIE BORUNDA; ELOY SANCHEZ; ROBERT CHAVEZ; FLAVIO ROMERO; ERNEST OLAGUE; DAVID GARCIA; MAURICE MOYA; FRANK CHAVEZ; and ROY BESERRA, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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April 13, 1976

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INDEX

CITATIONS

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The above-named Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this cause on November 20, 1975.

OPINION BELOW

The opinion of the Court of Appeals for the Tenth Circuit reported at 526 F.2d 431, appears in the Appendix hereto. The District Court for the District of New Mexico did not render a written opinion.

JURISDICTION

The judgment and opinion of the Court of Appeals for the Tenth Circuit was entered on November 20, 1975. Petitioners filed, in the Court of Appeals, a timely Petition for Rehearing and Suggestion for Rehearing *en banc*, which were denied on January 14, 1976. This petition for writ of certiorari was filed within 90 days of January 14, 1976. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether an unincorporated association (composed of incumbent Chicano police officers) and individual incumbent Chicano police officers have standing, under Article III of the Constitution of the United States, to challenge the hiring procedures (including entry level examinations) of a municipal police department, as being violative of 42 U.S.C. §§ 1981, 1983 and 1985.

2. Whether results of different promotional examinations, given in prior years, are relevant to individual claims (as opposed to class claims) that present promotional examinations have a discriminatory impact in violation of 42 U.S.C. §§ 1981, 1983 and 1985.

3. Whether a trial court, in an employment discrimination case brought under 42 U.S.C. §§ 1981, 1983 and 1985, may properly refuse to consider summaries of results of prior promotional examinations,

which contain classification and compilation errors, even though the objections raised to admission of such summaries were on different grounds.

4. Whether a prima facie case of employment discrimination, under 42 U.S.C. §§ 1981, 1983 and 1985, can be proved by statistics showing a two to one pass rate (or less), as between total examinees and Chicano examinees, where the evidence shows the ratio to be unstable, because of the small sample base.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES

Article III, § 2, Clause 1:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

CONSTITUTION OF THE UNITED STATES

Amendment XIV, § 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;

nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

UNITED STATES CODE, Title 42:

§ 1981. Equal rights under the law

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equally benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and no other."

§ 1983. Civil action for deprivation of rights

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the other party injured in an action at law, suit in equity, or other proper proceeding for redress."

§ 1985. Conspiracy to Interfere with Civil Rights

* * * * * * * * *

"(3) If two or more persons in any State or Territory conspire * * * for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; * * * in any case of conspiracy set forth in this section, if one or more persons engaged

therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

STATEMENT OF THE CASE

This is a case brought by twelve Chicano Police officers and the Chicano Police Officers Association (Association) (Respondents herein) against the Chief of Police, City Manager and Commissioners of the City of Albuquerque, New Mexico (Petitioners herein) challenging certain employment practices and procedures of the Albuquerque Police Department (Department) as being unconstitutionally discriminatory, in violation of 42 USC §§ 1981, 1983 and 1985 and other federal statutes (R., Vol. I, 9).

The Complaint did not allege a class action, but prayed for declaratory and injunctive relief from the results of promotional examinations conducted by the Department on June 2, 1973. (R., Vol. I, 9) The individual Respondents failed to qualify to take the examinations, or failed the examinations. Respondents also challenged the entry level requirements of the Department. (R., Vol. I, 9)

In August, 1973, the Department was composed of 402 commissioned police officers, 86 of whom were Chicano. (R., Vol. VI, 82) The membership of the Association is not limited to Chicano police officers (R., Vol. VI, 81). No member of the Association and no indi-

vidual plaintiff had been denied employment with the Department (R., Vol. I, 286).

A Department general order required: (1) that all officers to be promoted after January 1, 1972, must have completed at least six semester hours of college accredited study; (2) for promotion during 1974, twelve semester hours were required; (3) thereafter, an additional six hours per year is required until the officer obtains his bachelor's degree. (Pl. Ex. 6) Four of the individual Respondents lacked the six hours of college credit in 1973. Approximately 75 percent of the Chicano officers in the Department attended college in 1973 and received incentive pay for such attendance. (R., Vol. I, 293).

On June 2, 1973, the Department conducted examinations for promotion to the ranks of Sergeant, Lieutenant and Captain. For the most part, the written examinations were on texts in the areas of police administration, management, psychology, leadership and planning. Departmental General Order gave different weighting to the applicants' test score, supervisor's evaluation and oral interview. (Pl. Ex. 6)

Members of the Association did not read the assigned texts, *in toto,* but studied from chapter outlines prepared by one another. The Association urged all of the members to apply for promotion and take the examination. At least one member testified that he took the examination as a "dry run," not expecting to pass. (P., Vol. VII 157-159, 259-260, 303-305; Vol. VIII, 438). Dr. Frederic Carleton, an expert in personnel testing, testified that where there is self-selection of applicants on an employment test, the scores will range higher than where there is mandatory testing of an entire group. (R., Vol. X, 772-784)

The results of the June 2, 1973 Sergeants and Lieutenants examinations were as follows:

Sergeant's Examination:

(1)	Total Examinees	90
	Passing Examinees	17
	Percentage Passing	19%
(2)	Spanish-surnamed Examinees	26
	Passing Examinees	3
	Percentage Passing	11.5%

Lieutenant's Examination·

(1)	Total Examinees	44
	Passing Examinees	7
	Percentage Passing	16%
(2)	Spanish-surnamed Examinees	7
	Passing Examinees	1
	Percentage Passing	14%
(3)	Non-minority Examinees	36
	Passing Examinees	5
	Percentage Passing	14%

(R., Vol. VI, 63, 64, Pl. Ex. 14)

No Chicano took the June 2, 1973 examination for Captain (R., Vol. VI, 64). The examinations were entirely different, in content and weighting, from promotional examinations given by the Department in past years. (R., Vol. XIII, 460, 487) Dr. Carleton, the expert witness, testified that the statistics of the June 2, 1973 promotional examinations did not show a significant adverse affect on the Chicano officers. (R., Vol. X, 770-771, 772-787; Defts. Exs. 2, A1, B1, C1, D1, R., Vol. IX, 602-606)

At the trial, Respondents offered tabulations of results of promotional examinations given during the

years 1966 to 1971. Respondent Frank Chavez, who had compiled the tabulations, admitted on cross-examination that he had failed unintentionally to include in the tabulation several Spanish surnamed officers, and had omitted purposely several other Spanish surnamed officers, because he knew that these persons were really "Anglos." (R., Vol. VII, 109-114) Petitioners objected to the admission of the tabulations, on the grounds of irrelevancy. The District Court did not consider the tabulations in making its findings.

The question of standing of the Association to challenge the Department's entry level requirements was the subject of an affidavit of Respondent Frank Chavez, admitted by stipulation, subject to certain objections. That affidavit stated, *inter alia,* that (1) the Association "must have the support of as many Chicanos, and particularly Chicano policemen, as possible," (2) that the Association can negotiate effectively "only if it represents a substantial number of policemen" and that (3) discrimination against Chicanos in recruitment dilutes the strength of the Association and its effectiveness. (R., Vol. I, 202)

At the close of Respondents' evidence, the District Court granted Petitioners' Rule 41(b) motion, and dismissed the Complaint. The District Court concluded, *inter alia:* (1) that neither the Association nor any individual Respondent had standing to challenge the Department's entry level requirements; (2) that the Respondents had failed to present a *prima facie* case that the college educational requirement for promotion adversely affected them; (3) that the evidence failed to show that the promotional examinations caused a statistically significant discriminatory effect

on the Chicano officers; (4) that the two to one passing ratio of total to Chicano officers on the Sergeant's examination was not significant because of the small sample size, causing the ratio to be unstable; and (5) that the Respondents had shown no right to relief. (R., Vol. I, 293)

On appeal, the Court of Appeals for the Tenth Circuit reversed, holding, in short, that (1) the individual Respondents and the Association had standing to challenge the Department's entry level requirements; and (2) the Respondents had presented a *prima facie* case that the Department's promotional requirements were unconstitutionally discriminatory.

The findings and conclusions of the District Court, in their entirety, and the judgment were vacated. The case was remanded to the District Court for further proceedings.

REASONS FOR GRANTING THE WRIT

1. THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH DECISIONS OF THIS COURT CONCERNING STANDING TO SUE IN A FEDERAL COURT.

The District Court concluded that neither the individual police officers nor the Association had standing to challenge the hiring policies of the Department. (R., Vol. I, 289) In reversing, the Court opined that (1) secondary effects of discriminatory entry level requirements upon incumbent police officers afforded a valid basis of standing to the individual Respondents, and (2) the Association had standing because of its "direct stake . . . in challenging barriers against employment of those from whom it might well enhance its membership and resources to attain its goals". (Ct. App. Opn., App. p. 9a)

The Court of Appeals reached its decision that all of the Respondents had standing to attack the entry level requirements, in spite of the following facts: (1) that the litigation was not brought as a class action; (2) that none of the individual Respondents or the membership of the Association had been excluded from employment because of the Department's hiring policies; and (3) that challenged hiring policies did not directly apply to members of the Association or the other Respondents, all of whom were incumbent police officers.

It is respectfully suggested that the holding of the Court of Appeals is indirect conflict with decisions of this Court defining the "case and controversy" requirements of Article III of the United States Constitution, and stating prudential standing limitations for the federal court system. The Court of Appeals, although citing the recent standing pronouncement of this Court in *Warth* v. *Seldin*, 422 U.S. 490, 45 L. Ed. 2d 343, 95 S. Ct. 2197 (1975), apparently disregarding the guidance offered by that decision.

Standing of persons, not directly affected, to maintain a civil rights action, challenging employment practices, is an issue of primary importance which frequently confronts the lower federal courts. The Tenth Circuit has assumed a most permissive stance, allowing civil rights litigants to challenge employment policies which, at most, affect them only remotely. That stance should be reviewed.

A. Neither the Association Nor the Other Plaintiffs Made a Showing of Injury Sufficient To Establish the Specificity and Causation Requirements of Warth.

In *Warth*, various plaintiffs [1] sued the Zoning, Planning and Town Boards of the Town of Penfield in New York to enjoin the enforcement of zoning ordinances and other land-use restrictions which, it was claimed, effectively excluded persons of low- and moderate-income from living in Penfield. The low-income taxpayers asserted that because of the zoning ordinance, they were unable to purchase housing at prices they could afford. The district court for the Second Circuit dismissed for lack of standing. The Court of Appeals for the Second Circuit affirmed the dismissal. This Court, speaking through Justice Powell, set forth the two criteria for determining the nature of the injury cognizable by the federal courts and the casual relationship between the challenged governmental restriction and the injury alleged. This Court first determined that even where a plaintiff has alleged sufficient injury to meet the "case and controversy" requirement, the plaintiff "generally must assert his own legal rights and interests and cannot rest his claim to relief on the legal rights and interests

[1] The plaintiffs included 8 individual plaintiffs and Metro-Act of Rochester, Inc., a not-for-profit corporation, having as its purpose to urge action to alleviate the general shortage of housing for low- and moderate-income persons. Five of the plaintiffs were resident-taxpayers of the City of Rochester or of surrounding communities. Three plaintiffs were low- and moderate-income residents of Rochester.

of third parties".[2] 45 L. Ed. 2d at p. 355. This Court then enunciated a simple test for determining whether the litigant had standing to assert his claim: The plaintiffs must show by a *substantial probability* that but for illegal governmental action, injury to the plaintiff would not occur. In short, where a government regulation causes direct harm to a party because of its application to third persons, the indirectness of the injury may not preclude the party from having standing but requires specific factual allegations and proof establishing demonstrable causation between the injury and the governmental action.

The failure of proof of injury and causation fatal to plaintiffs' claim in *Warth* is replicated in the case at bar. The Court of Appeals placed substantial reliance on the Affidavit of Respondent Frank Chavez. (R., Vol. I, 202) That affidavit is totally devoid of any specific factual allegations upon which the Association's fulfillment of its objectives can be connected with elimination of the challenged hiring policies. The Affidavit opines that the Association "must have the support of as many Chicanos and particularly Chicano policemen as possible." It concludes that the Association can negotiate effectively "only if it represents a substantial number of policemen". Finally, it offers an opinion, unsubstantiated by specific factual allegations, that discrimination against Chicanos in recruitment

[2] In *Warth*, as in the case at bar, the governmental restriction in this case does not apply to the particular plaintiffs to the action. The low-income plaintiffs were not residents of Penfield and the ordinance in question applied only to Penfield, not Rochester. Similarly, the governmental policies attacked in the case at bar did not apply to any of the named plaintiffs, but rather to unnamed, unidentified, potential employees of the police department.

dilutes the strength of the Association and its effectiveness. (R., Vol. I, 202)

These are merely bald conclusions unsupported by any specific factual proof. The record contains no evidence showing a substantial likelihood of an enhanced negotiating position should the hiring policies be invalidated. Respondents did not show a causal relationship: (1) that should more Chicanos be employed as policemen, the membership of the Association would in fact be increased; (2) that even should more Chicanos join the Association, the Police Officer's Association would be able to negotiate more effectively with the department; and (3) that the Association had ever negotiated with the Albuquerque Police Department, or had in the past suffered any inability to do so effectively because of inadequate numbers. There was no testimony from any witness that the Association had been stymied in its attempts to deal with the Department because of insufficient numbers or that the Association's negotiating position would be affected favorably by an increase in membership. Indeed, there is no indication that the Association had ever negotiated with the Department in the past.

As the trier of fact, the District Court found Chavez' conclusionary allegations insufficient. In reversing, the Court of Appeals held that the District Court should have inferred the necessary causal relationship from the evidence that approximately 42 of the 70 Chicano officers on the force were signed members of the Association.[3] It is submitted that such a conclusion violates the spirit and the letter of *Warth*.

[3] In fact, the Court of Appeals used an erroneous figure for the total number of Chicano officers on the force. In August, 1973 there were 86 Chicano officers. See footnote 10 of Court of Appeals opinion. See also R., Vol. IX, 643.

B. Neither the Association Nor the Other Plaintiffs Have Standing To Assert the Rights of Third Parties.

In *Warth,* this Court specifically limited those cases where a party will be allowed to challenge governmental restrictions based on violation of a third party's rights. The first exception is where Congress confers standing by statute to a litigant who would not otherwise have had it. The second exception was where enforcement of the challenged restriction would result indirectly in violation of third party's rights. The third exception involved cases where the third party was under a disability which precluded the assertion of his legal or constitutional rights himself.

In the case at bar, Congress has not conferred any special standing on incumbent employees to assert the rights of applicants for employment. The vindication of Respondents' rights does not depend on the assertion of third persons' rights. See *Barrows* v. *Jackson,* 346 U.S. 249, 97 L.Ed. 1586, 73 S.Ct. 1031 (1953). And there is no disability which prevents frustrated applicants from bringing their own lawsuit if they so desire

This Court's treatment of the Metro-Act's standing in the *Warth* case disposes of the precise argument adopted by the Court of Appeals, in the instant case, on *jus tertii* standing. Metro-Act, a not-for-profit corporation, alleged that 9% of its membership were present residents of Penfield. For this reason, the zoning ordinance directly applied to them. Metro-Act had argued that these Penfield residents were directly affected by the exclusionary zoning practices by being deprived of the benefits of living in a racially and ethnically integrated community. This argument is identical to that of the Association and the other Respondents that they have been deprived of a racially integrated police force which might enhance the position of Chicanos generally within the Department. On this point, too, the opinion of the Court of Appeals directly conflicts with the *Warth* decision.

In its opinion, the Court of Appeals observed that "there is no indication of a lack of concrete adverseness between the position the plaintiffs take and that of defendants", (Opin., Ct. App., App. p. 11a) referring to the requirement of true adversity discussed in *O'Shea* v. *Littleton*, 414 U.S. 488, 493-494, 38 L.Ed.2d 674, 94 S. Ct. 669 (1974), and *Baker* v. *Carr*, 369 U.S. 186, 204 7 L.Ed.2d 663, 82 S.Ct. 691 (1962). Again, the teaching of *Warth* was missed. Like the plaintiffs in *Warth,* the incumbent police officers and the Association have no real proven stake in the vindication of rights of absent persons. In such cases, concrete adverseness cannot be insured.

Because of the direct and apparent conflict between the opinion of the Court of Appeals, and this Court's decision in *Warth,* the Writ should issue.

2. THE OPINION OF THE COURT OF APPEALS, HOLDING AS A MATTER OF LAW THAT RESPONDENTS HAD PRESENTED A PRIMA FACIE CASE CONFLICTS WITH DECISIONS OF THIS COURT AND SUBSTANTIALLY DEPARTS FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

In reversing the District Court's dismissal of the Complaint, the Court of Appeals held:

—That the results of different promotional examinations for the ranks of sergeant, lieutenant, and captain, given from 1966 to 1971, were relevant to the respondents' individual claims (as opposed to a class action) that the promotional examinations given on June

2, 1973 had a discriminatory impact on the Chicano Police Officers taking that examination.

—That the District Court erred by not considering proferred summaries of past examinations, which contained classification and compilation errors, since Petitioners' objections thereto raised only relevancy grounds.

—That Respondents' proof of a two to one pass rate (or less), as between total and Chicano examinees proved a *prima facie* case, in spite of substantial evidence that the ratio was unstable, because of the small base of the statistics.

It is respectfully submitted that these holdings conflict with decisions of this Court and substantially depart from the accepted and usual course of judicial proceedings.

A. The Relevancy of Prior Examination Results

Despite the fact that this action was not brought as a class action, but only for declaratory and injunctive relief to individual police officers who failed the promotional examinations given on June 2, 1973, the Court of Appeals held that results of different promotional examinations given from 1966 to 1971 were relevant.

All of the individual Respondents took the examinations given on June 2, 1973 (R., Vol. V, 6€; Vol. VI, 194, 245, 289, 319, 332; Vol. VII, 348, 398, 411-412, 435), and were asking for individual relief from the results of those examinations. The June 2, 1973 examinations were substantially different from prior examinations in weighting and content. (R., Vol. VI, 289; Vol. VII, 460, 487).

The Court of Appeals recognized the standard for proof of a *prima facie* case, established by *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 432, 28 L.Ed.2d 158, 191 S.Ct. 849 (1971)—that the plaintiff needs only to show that the *challenged procedures* have a discriminatory result. However, the Court of Appeals reasoned that proof of a *prima facie* case may necessitate "a backward glance . . ." (quoting its decision in *EEOC* v. *University of New Mexcio, Albuquerque,* 504 F.2d 1296, 1304 [1974]), and the plaintiff should be free ". . . to develop proof of the general overall trends in hiring and promotion policies" (citing its decision in *Rich* v. *Martin-Marietta Corp.*, 522 F.2d 333, 343, 345 [1975]). In support of its conclusion that results of prior examinations were relevant, the Court of Appeals relied upon cases involving *class action challenges* to prior and present employment practices and procedures. See *Chance* v. *Board of Examiners,* 458 F.2d 1167 (2nd Cir., 1972), and the cases set forth in footnote 6 of the Court of Appeals opinion App., p. 13a. Here, the issue was whether the June 2, 1973 examinations had an unconstitutional discriminatory impact. Class claims related to prior examinations were not raised. Thus, statistics of prior years were not probative.

In effect, the Court of Appeals held that, even if the results of the challenged examinations showed no discriminatory impact, the aggregate results of totally different examinations given during the prior seven years should have been considered on this issue. It is submitted that this broad concept of relevancy of statistical data to make a *prima facie* showing in an employment civil rights case is in conflict with the teaching of *Griggs,* and should be reviewed by this Court.

B. The Propriety of Rejecting Unreliable and Inaccurate Evidence, Even Though the Objection Is on the Grounds of Relevancy.

At the trial of the case, Respondents offered into evidence tabulations of the results of prior promotional examinations given by the Department. (Plaintiffs Exhibits 7-12). On cross-examination, Respondent Roy Chevez admitted that, in preparing the tabulations, he had overlooked several Spanish surnames and had purposely omitted several more Spanish surnames because such individuals, in his opinion, were really "Anglos" (R., Vol. I, 109-114). Petitioners raised objections to the tabulations on the specific grounds of relevancy. Although the District Court reserved its ruling on admission of the tabulations, in making its findings, no mention of prior examination results was made.

The Court of Appeals held that it was error for the District Court to give no consideration to the tabulations, stating that Petitioners' objections to admission of the tabulations ". . . raised only relevancy and (we) must assume this was the basis for the trial court's exclusion of the proof." (Ct. App. Opn., App. p. 12a). Since the Court of Appeals viewed the statistics of prior examinations as relevant, the failure of the trial court to consider these tabulations was found to be erroneous. Disregarded entirely by the Court of Appeals was the evidence indicating that the tabulations were unreliable because of compilation errors.

The ruling of the Court of Appeals conflicts with settled decisions of this Court, establishing the rule that ". . . a specific objection *sustained* (like a general objection) is sufficient, though naming an untenable ground, if some other tenable one existed." *Kansas*

City Southern Railway Co. v. *Jones,* 241 U.S. 181, 60 L.Ed. 943, 3 Sup. 513 (1916); *Hamling* v. *U.S.*, 418 U.S. 87, 108, 41 L.Ed.2d 590, 615, 94 S.Ct. 2887 (1974). In its opinion on the Petition For Rehearing, the Court of Appeals attempted to avoid this apparent conflict, stating: "Without considering whether such rule would apply here, this record convinces us that rejection of all the proof of prior examinations cannot be sustained here." (Ct. App. opn., App., 18a). The "proof" offered was the tabulations, which were admittedly inaccurate. Thus, the Court of Appeals substitutes its opinion of the reliability of evidence for that of the District Court, and in the process, violates fundamental rules of evidence and customary rules of appellate review.

Because of the conflict between this holding of the Court of Appeals and long-standing decisions of this Court, the Writ should issue.

C. The Significance or Insignificance of an Unstable Pass-Fail Ratio

The results of the June 2, 1973 examinations conducted by the Department for promotion to the rank of Sergeant showed that 19 percent of 90 total examinees passed, while 11 percent of the 26 Chicano examinees passed. The District Court noted that this two to one ratio was highly unstable in that a variance of two Chicanos passing or failing would yield ratios between five to one, and one to one.[4] Accordingly, the

[4] Although the Court of Appeals set aside all findings and conclusions, there was no statistical evidence that the examinations for promotion to lieutenant and captain had a disparate effect. The pass ratio was one to one for the lieutenant's examination. None of the five examinees taking the captain's examination was Chicano.

District Court concluded that the disparity in pass rate was not statistically significant. This conclusion is supported in the record by the testimony of Dr. Frederic Carleton, a well qualified psychometrician, who testified that the statistics did not significantly show any adverse impact of the examinations. (R., Vol. X, 770-778, Defts. Exhibits 2, A1, B1, C1, D1)

Regardless of substantial evidence to support the District Court's conclusion that the ratio was unstable because of the small sample size, the Court of Appeals reversed, reasoning that rejection of small sample statistics would " . . . deny employees in small plants the type of protection the civil rights statutes afford." (Ct. App. Opn., App. p. 15a). Thus, the Court of Appeals arrived at a very novel (and untenable) stand—that a *prima facie* case of unconstitutional employment discrimination may be shown from unstable statistics derived from a small sample base.

Moreover, the Court of Appeals rejected the District Court's reliance upon evidence that the test statistics were not probative. Evidence which was held, as a matter of law, to be of no consequence in assessing the reliability of the statistics included: (1) that the Chicano officers did not read the texts assigned, but studied from chapter outlines prepared by one another; (2) that the Association urged all Chicano officers to take the tests; (3) that one Chicano officer took the test as a "dry run," not expecting to pass; (4) that when a test is given on a self-selection basis, the examinees will score higher than when all within a group are tested. (R. Vol. VII, 157-159, 259-260, 303-305; Vol. VIII, 438)

The Court of Appeals held that reliance upon this evidence by the trial court was erroneous, in that an

improper burden was imposed upon the Respondents—i.e., to show that non-minority examinees passed with equal or less preparation than the Chicano examinees.

In holding that a *prima facie* case had been proved, as a matter of law, the Court of Appeals stripped the District Court of all discretion to weigh the reliability and probative value of statistical evidence. It is respectfully submitted that such holding is in conflict with the tests established by this court in *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 28 L.Ed.2d 158, 91 S.Ct. 848 (1971), and violates basic trial principles of the federal court system.

CONCLUSION

Upon the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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April 13, 1976

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS, TENTH CIRCUIT

No. 74-1163.

CHICANO POLICE OFFICER'S ASSOCIATION ET AL.,
Plaintiffs-Appellants,

v.

ROBERT V. STOVER, Chief of Police, Albuquerque Police Department, ET AL., *Defendants-Appellees.*

Ray M. Vargas, Albuquerque, N. M. (Richard C. Bosson, Albuquerque, N. M., Vilma S. Martinez, Sanford Jay Rosen and Drucilla S. Ramey, San Francisco, Cal., and Joseph R. Grodin, San Francisco, Cal., of counsel, University of California Hastings College of Law, on the brief), for plaintiffs-appellants.

William S. Dixon, Albuquerque, N. M. (Frank L. Horan, City Atty., and Rodey, Dickason, Sloan, Akin & Robb, P. S., and Duane C. Gilkey, Albuquerque, N. M., on the brief), for defendants-appellees.

Before SETH, HOLLOWAY and DOYLE, Circuit Judges.

HOLLOWAY, Circuit Judge.

This civil rights suit challenges both the hiring and promotion procedures of the Albuquerque, New Mexico, Police Department (the Department) as racially discrimintory against Spanish-speaking and surnamed Americans. The plaintiffs are twelve Chicano employees of the Department and the Chicano Police Officer's Association (the Association).[1] The defendant Stover is the Chief of Police of the

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[1] Throughout this opinion we will use the term "Chicano" to designate the racial minority of Spanish-speaking and Spanish surnamed Americans whom the suit concerns.

Department and the other defendants are the City Commissioners and City Manager of Albuquerque.

The complaint essentially alleged that the defendants had deprived plaintiffs, under color of State law, of rights, privileges and immunities secured by the constitution and laws of the United States in violation of 42 U.S.C.A. §§ 1981, 1983 and 1985 (R. I, 9). The complaint averred that defendants employed hiring and promotion procedures including tests and other job criteria which are not substantially related to job performance and have the effect of excluding a disproportionate number of Chicanos from employment and promotions in the Department, thus violating rights secured by the equal protection clause; by 42 U.S.C.A. §§ 1981, 1983 and 1985, and other statutes. Jurisdiction was claimed under 28 U.S.C.A. § 1343(3) and (4), and declaratory and injunctive relief were sought.

After presentation of the plaintiffs' evidence, and that of two defense witnesses heard out of turn, defendants moved to dismiss under Rule 41(b), F.R.Civ.P., on the ground that plaintiffs had shown no right to relief. The trial court made written findings and conclusions adverse to the plaintiffs and dismissed.

On appeal plaintiffs argue principally that the trial court erred in that:

1. The court erred in holding that plaintiffs lack standing to challenge the hiring or entry level procedures of defendants; and

2. It was error to find and conclude that plaintiffs had made no *prima facie* case of the unlawfulness of the promotion procedures used by defendants.

We turn to the findings and conclusions of the trial court which are of critical importance.

I

The Trial Court's Findings and Conclusions

The trial court made these findings: The Chicano Police Officer's Organization is an unincorporated association composed chiefly of Spanish-speaking or Spanish surnamed police officers in the Albuquerque Police Department. Its membership is not limited to Spanish-speaking or Spanish surnamed officers and not all such officers are members of the Association. The Association seeks to achieve equal opportunity for Spanish-speaking or surnamed Americans in recruitment and promotions within the Department, and to discourage discrimination.[2]

The court found that no member of the Association and no plaintiff has been denied employment with the Department.

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[2] Plaintiffs' exhibit 1, a brochure of the Association, states that the Association's aims include, *inter alia:*

STATEMENT OF PURPOSE

The Chicano Police Officers Association also known as the Concerned Police Officers Association is dedicated to the following principles and purposes:

* * * * * * * *

2. To achieve equal opportunity in recruitment, promotion, assignment, evaluation, and other areas within all Police Departments.

* * * * * * * *

6. To actively support the recruitment of personnel for police work in such a manner as to insure proportionate representation within the profession of all cultural and ethnic groups of the population of our community.

7. To encourage racial and ethnic harmony within the profession, as well as between the profession and the community and to discourage racism and discrimination.

* * * * * * * *

10. To expand our knowledge of the various cultures and heritages of other people and to educate other members of the police profession on our own culture.

The court found further that police officers must be high school graduates or have obtained a general equivalency degree. The Department's General Order 71-23, issued December 17, 1971, requires that all officers to be promoted after January 1, 1972, must have completed at least six semester hours of college accredited study. Those to be promoted during 1974 were required to have completed twelve semester hours, and an additional six hours credit per year is required until a bachelor's degree is attained.

Promotional examinations were held on June 2, 1973. Four individual plaintiffs were ineligible to take the examination because they lacked the six hours of college credit. The court found, however, that there was ample notice and opportunity for completion of the six hour requirement prior to its application precluding officers from taking the examination. There had been an incentive pay of $1 per month for each hour of college credit, and from April, 1973, to June, 1978, 208 officers of the Department received incentive pay. Fifty-three of approximately seventy Spanish-speaking or surnamed officers received incentive pay under the program. 155 of approximately 305 Anglo officers received incentive pay. It was found that this demontrates that 75% of the Spanish-speaking/surnamed officers attended college during the period and that the educational requirement did not erect a barrier for a minority group and that the requirement did not have a discriminatory effect on Chicanos as a group.

The results of the June 2, 1973, examination were summarized by the court as follows:

A. Sergeant's Examination:

1) Total Examinees	90
Passing Examinees	17
Percentage Passing	19%
2) Spanish-surnamed Examinees	26
Passing Examinees	3
Percentage Passing	11.5%

B. Lieutenant's Examination:

1) Total Examinees	44
Pasing Examinees	7
Percentage Passing	16%
2) Spanish-surnamed Examinees	7
Passing Examinees	1
Percentage Passing	14%
3) Non-minority Examinees	36
Passing Examinees	5
Percentage Passing	14%

No Spanish-surnamed Americans took the June 2, 1973, examination for captain. The examinations were achievment tests and their subject matter was taken from tests on police administration, management, psychology, leadership and planning. Members of the Chicanos Police Officer's Association formed a study group. Some were assigned responsibility for outlining portions of the assigned texts. Several officers read some but not all the texts and relied on outlines for the material they did not read. The June 2, 1973, examination had not been used before and is not to be used in the future.

The court concluded that no plaintiff has standing to contest the hiring policies of the Department. The injury alleged by the Association and one individual plaintiff is that development of the power to negotiate for the betterment of the position of Chicanos is stifled by policies perpetuating under-representation of the Spanish minority on the police force. It was concluded, however, that the relief sought would not directly benefit the Association, and that the Association and its members have only an indirect stake in the outcome and are not entitled to assert the rights of those directly affected and not present in the suit.

The court concluded that the plaintiffs have failed to establish *prima facie* that the college educational requirement adversely affects minority groups. It concluded that the plaintiffs failed to show that the promotional examinations caused a statistically significant discriminatory impact on Spanish-speaking/surnamed officers. The overall pass ratio for each examination was small. 19 percent passed the sergeant's examination and 16 percent passed the lieutenant's examination. The ratio of Spanish-surnamed passing to non-minority passing was one to one on the lieutenant's examination and slightly less than two to one on the sergeant's examination.

The 11 percent pass rate for Spanish-speaking/surnamed examinees for sergeant is arrived at from a small sample, since only 26 Spanish-speaking/surnamed were eligible to take the examination. Three of the 26 passed. The trial court held that the 11 percent figure is not stable or highly reliable. A variance of two Spanish individuals passing or failing would yield ratios between five to one and one to one.

The court concluded that any significance the two to one ratio might have is undermined by the testimony. There was no showing that any other examinees were able to pass with equal or less preparation. Thus, the court concluded that it cannot be said that the disparity in pass rate is statistically significant.

The court concluded further that the plaintiffs have shown no right to relief. It was observed, however, that had they made a *prima facie* showing of a discriminatory impact of the tests, the defendants probably could not have carried their burden of persuasion; that defendants need to improve recruitment and promotion policies to alleviate under-representation of the Spanish minority at all levels of the Department; that the heavy reliance placed on the achievement type test seems inequitable and misplaced;

and that the test does not go far enough in showing performance, leadership and supervisory ability.

The court said further that the value and reliability of the present promotional scheme was dubious, but that the evidence has not shown the significant adverse impact on minorities which is necessary to support an injunction or imposition of a court-ordered remedial plan. And the court stated that immediate steps should be taken to solve these problems and eliminate ". . . what could become a breeding ground for future litigation."

On these findings and conclusions the court dismissed with prejudice.

II

Standing To Challenge the Entry Level Hiring Procedures

First, plaintiffs argue that the trial court erred in holding that no plaintiff has standing to challenge the hiring policies of the Department. As stated, the court reasoned that the injury alleged by the Association and one officer is that the development of power to negotiate for the betterment of the position of Chicanos is stifled by policies perpetuating under-representation of Chicanos. However, the court concluded that the Association and its members have only an indirect stake in the outcome and are not entitled to assert the right of those directly affected and not otherwise present in the suit—persons unsuccessfully seeking employment or discouraged from doing so.

We must, of course, observe the requirements for standing which have a constitutional starting point in Article III. *Warth* v. *Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 45 L.Ed.2d 343; *Data Processing Service* v. *Camp*, 397 U.S. 150, 152, 90 S.Ct. 827, 25 L.Ed.2d 184. The plaintiffs must show that the challenged action has caused them injury in fact, economic or otherwise, and that the interest they seek to protect is arguably within the zone of interests to

be protected or regulated by the statute and the constitutional guarantee in question. Id. at 152-53, 90 S.Ct. 827; *United States* v. *SCRAP*, 412 U.S. 669, 686-90, 93 S.Ct. 2405, 37 L.Ed.2d 254. They must have a personal stake in the outcome. *Warth* v. *Seldin*, supra, 422 U.S. at 499, 95 S.Ct. 2197. This requirement is to insure that concrete adverseness which sharpens presentation of issues on which the courts depend for illumination of difficult constitutional questions. *O'Shea* v. *Littleton*, 414 U.S. 488, 493-94, 94 S.Ct. 669, 38 L.Ed.2d 674; *Baker* v. *Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 7 L.Ed.2d 663.

Nevertheless, the standing requirement is not to be applied to defeat constitutional claims. An "identifiable trifle" is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation. *United States* v. *SCRAP*, 412 U.S. 669, 689, n.14, 93 S.Ct. 2405, 37 L.Ed.2d 254.

In our case we have both individual plaintiff Chicano officers and the Association maintained for others.[3] The plaintiffs allege that by denying to them and other Chicano citizens the benefits of being hired and promoted—which denial is on the basis of invalid tests and criteria having no substantial relationship to job performance—the effect is to exclude a disproportionate number of Chicano citizens in violation of the equal protection clause and various statutes. The affidavit of Mr. Chavez supports the general claims made, stating that in working with the Department for fair treatment of Chicanos and other minorities, the Association must have the support of as many Chicanos as possible; that only if it represents a substantial number of policemen can they negotiate effectively with the Department from a position of strength; that discrimination against Chicanos in recruitment and hiring dilutes the strength of the Association and directly affects its effectiveness; and that Chavez is personally affected in his attempts to change the system by the effect of what he believes to be discrimination against Chicanos in the entrance procedures of the Department.

[3] This makes inapposite the class action cases relied on by plaintiffs which support the "across the board" theory permitting one plaintiff to challenge all discriminatory practices of an employer. We do not reach this theory in our disposition.

We are satisfied that both the Association and the individual plaintiffs made a sufficient showing of standing. This was demonstrated, we feel, by undisputed proof and reasonable and obvious inferences. The Association had 44 signed members at the time of trial (Nov. 26, 1973), and about 50 members in all (Tr. 82). Of these only one or two were Anglos. Id. In the period from April to June, 1973, the court's findings state that there were approximately 70 Spanish-speaking/surnamed officers and approximately 312 Anglo officers on the force (see Finding 23). Thus, from the proof it is clear that a substantial portion of Chicanos obtaining employment on the force joined the Association. The Association therefore has a direct stake, independent of its members' rights under the Civil Rights Act, in challenging barriers against employment of those from whom it might well enhance its membership and resources to attain its goals. *Warth* v. *Seldin*, supra, 422 U.S. 511, 95 S.Ct. 2197; *Albany Welfare Rights Organization* v. *Wyman*, 493 F.2d 1319, 1322 (2d Cir.).

We are also satisfied that the proof made a sufficient showing of standing of the individual plaintiffs to challenge the hiring procedures. There is recognition of secondary effects on others as a valid basis for standing in several instances. In *Marable* v. *Alabama Mental Health Board*, 297 F.Supp. 291, 297-98 (M.D. Ala.), the court upheld the standing of individual mental patients for themselves and for a class to challenge the discriminatory hiring practices affecting staff personnel of the institution where they were located. The court reasoned that the sec-

ondary effects of discrimination on the plaintiffs as patients entitled them to challenge the hiring procedures relating to the staff personnel. Ibid. In like manner the standing of students to challenge the discriminatory policies of teacher assignments has been sustained on the rationale that the removal of a discriminatory educational system and the achievement of a non-racially operated system afforded standing rights to individual plaintiffs. *Lee* v. *Macon County Board of Education*, 267 F.Supp. 458, 472-73, 478 (M.D.Ala.), aff'd *sub nom. Wallace* v. *United States*, 389 U.S. 215, 88 S.Ct. 415, 19 L.Ed.2d 422.

Moreover, this court recently affirmed a similar order for transfer of school officials, recognizing implicitly the standing of individual students to assert the invalidity of discriminatory personnel policies affecting others because the policies had a secondary effect on the students. See *Dowell* v. *Board of Education of the Oklahoma City Public Schools*, Unpublished Order (10th Cir., January 31, 1975), cert. denied, —— U.S. ——, 96 S.Ct. 37, 46 L.Ed.2d 40 (1975). The fact that harm from discriminatory hiring policies is imposed directly on the rejected or discouraged applicant does not deprive the present Chicano officers of standing to challenge the hiring practices that are asserted to produce an under-representation of Chicanos on the force. The indirectness of the injury to the employees does not necessarily deprive them of standing to vindicate their rights. See *Warth* v. *Seldin*, supra, 422 U.S. 504-05, 95 S.Ct. 2197, and to seek removal of the taint of racial discrimination from the work force.[4]

[4] There is a substantial factual basis for the claim that discrimination exists at the entry level. The evidence of under-representation throughout the police force apears in Part III, infra. Additional evidence reflects a racial disproportionality in the results of entrance examinations administered by the defendants between 1971 and 1973. Based upon a large sampling of examinees, it appears that the pass rate among Spanish-surnamed Americans was approximately 43.2% for the years 1971 through 1973, while the non-Spanish-surnamed Americans passed at a 78.9% rate; a pass rate ratio of 1.83:1. (Exhibit 2; R. 328).

In sum, we are satisfied that both the Association and the individuals made a sufficient showing of standing to challenge the allegedly discriminatory hiring policies and, of course, there is no indication of a lack of concrete adverseness between the position the plaintiffs take and that of defendants. See *Baker* v. *Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 7 L.Ed.2d 663. It follows that we must hold that the court was in error in its findings and conclusions denying standing to plaintiffs to challenge the entry level hiring procedures.

III

The Trial Court's Ruling that no Prima Facie Case was made by Plaintiffs

Plaintiffs' second argument on appeal is that the trial court erred in holding that plaintiffs had not made out a *prima facie* case against the promotion level procedures and in dismissing their claim for relief from such allegedly unlawful procedures. More specifically plaintiffs say the court erred (1) by excluding evidence relating to prior examinations; (2) by concluding plaintiffs had not established a *prima facie* case on the evidence presented; (3) by ignoring, as a consequence of its rulings as to standing, the relationship between promotions and discriminatory hiring practices; and (4) by dismissing their showing as not statistically significant because any significance of the slightly less than two to one ratio on the sergeant's test was undermined by the testimony.[4a] (Brief of Plaintiffs-Appellants at 27, 34).

First, we feel the exclusion of the prior examinations poses a serious question. Plaintiffs offered proof of the

[4a] Although not explicitly set out in the findings, the two to one pass rate ratio derived by the court is apparently the correct statistical comparison of the pass rate of non-minority examinees to the pass rate of the minority examinees. See *Bridgeport Guardians, Inc.* v. *Members of Bridgeport Civil Service Commission*, 482 F.2d 1333 at 1335, n.3 (2d Cir. 1973), cert. denied, 421 U.S. 991, 95 S.Ct. 1997, 44 L.Ed.2d 481 (1975); see also cases cited therein.

results of examinations from 1966 to 1971 (Plaintiffs' Exhibits 7-12). Objections were made on the ground of relevancy to these exhibits, defendants arguing that an intervening and different examination was now being given and that the results of the old examinations were irrelevant (See Tr. 49, 53; and the various objections at 49-60). Other objections are said to have been urged and are now argued on appeal to support the exclusion of the exhibits (Answer Brief of Defendants-Appellees at 12-15). We read the record to have raised only relevancy and must assume this was the basis for the trial court's exclusion of the proof.[5]

We agree with the view that the measure of a claim under the Civil Rights Act is in essence that applied in a suit under Title VII of the Civil Rights Act of 1964. *Chance* v. *Board of Examiners,* 458 F.2d 1167, 1175-76 (2d Cir.); see *Sabol* v. *Snyder,* 524 F.2d 1009, 1012 (10th Cir. 1975). Relief may be had from artificial, arbitrary and unnecessary barriers to employment when they operate invidiously to discriminate on the basis of racial or other impermissible classifications. *Griggs* v. *Duke Power Co.,* 401 U.S. 424, 431, 91 S.Ct. 849, 28 L.Ed.2d 158. While the employer's intent may be examined, *Griggs* supra at 432, 91 S.Ct. 849, the plaintiff needs only to show that the challenged procedures have a discriminatory result, *Griggs,* supra at 432, 91 S.Ct. 849. This showing would make out a prima facie case, requiring the employer to demonstrate that his employment criteria or tests were validly job-related. *Spur-*

[5] There was no express ruling on the objection. However the trial court's detailed findings treat only the latest promotional examinations given on June 2, 1973, and it is apparent that the court did not weigh the earlier examinations in its considerations.

On the further trial for which we are remanding, the trial court may, of course, consider authenticity or other objections timely made and the defendants may develop the weaknesses which they say exist as to the exhibits covering past years.

lock v. *United Airlines, Inc.,* 475 F.2d 216, 218 (10th Cir.); *Chance* v. *Board of Examiners,* supra, 458 F.2d at 1176.

Obviously, the scope of proof must be broad to establish such a *prima facie* case. It is open to the plaintiff to develop proof of the general overall trends in hiring and promotion policies. See *Rich* v. *Martin-Marietta Corp.,* 522 F.2d 333, at 343, 345 (10th Cir. 1975), and this may necessitate "a backward glance. . . ." *EEOC* v. *University of New Mexico, Albuquerque,* 504 F.2d 1296, 1304 (10th Cir.). In our type of case we must agree with the view in *Chance* v. *Board of Examiners,* 458 F.2d 1167, 1171 (2d Cir.), where examinations given during several past years to large numbers of applicants were considered.[6]

Defendants argue that the prior tests were different from those given on June 2, 1973.[7] However, if such an objection were sustained an employer could always say that he regularly changes examinations and thus insulate unlawful practices from scrutiny.[8] We cannot agree with

[6] We note that a compilation of prior test results was relied upon in *Bridgeport Guardians,* supra, 482 F.2d at 1335 (five years of entrance exams; twelve years of promotional exams were admitted, although for some reason the court did not compile the statistics on the promotional exams), see 354 F.Supp. 778 at 795; in *Chance* v. *Board of Examiners,* 330 F.Supp. 203 at 209 (S.D. N.Y.1971), aff'd, 458 F.2d 1167 (2d Cir. 1972) ("50 supervisory examinations given over the past few years."); in *Commonwealth of Pa.* v. *O'Neill,* 348 F.Supp. 1084 at 1101 (E.D. Pa. 1972), aff'd, 473 F.2d 1029 (3d Cir. 1973) (three written promotion exams given between 1968 and 1970); and in *Harper* v. *Mayor and City Council of Baltimore,* 359 F.Supp. 1187 (D.Md. 1973) modified sub nom. *Harper* v. *Kloster,* 486 F.2d 1134 (4th Cir. 1973) (the court considered exam results from 1971, 1963, 1960, 1957 and 1956, 5 exams), see 359 F.Supp. at 1198-99.

[7] The trial court found that the examinations given on June 2, 1973, had not been given before and are not to be given in the future (R. 289).

[8] We assume that an employer would regularly change at least the specific questions on examinations to avoid them becoming simply a memory exercise to recall answers to available prior tests.

defendants' theory and instead feel that prior procedures, at least for the years here offered, were relevant.

The question of relevance and of remoteness of exhibits in time is, of course, generally within the discretion of the trial court. Here, however, we are satisfied that the proof offered was clearly within a reasonable time frame and should not have been rejected as irrelevant. In this connection we note that such proof need not show a racially disproportionate impact with mathematical nicety; its purpose is initially to premise a finding whether a *prima facie* case is made; such a finding does not decide the case and instead only places the burden on the defendant to justify the testing criteria in question. *Vulcan Society of the New York City Fire Department* v. *Civil Service Commission of the City of New York*, 490 F.2d 387, 393 (2d Cir.).

In the circumstances before us we feel rejection of the exhibits of these plaintiffs as irrelevant was error.

Second, plaintiffs argue the trial court erred in dismissing the 2 to 1 ratio as statistically insignificant because of the smallness of the sample and undermining of its significance by the testimony (Brief of Plaintiffs-Appellants at 34). They are pointing to the Court's conclusion that they failed to show that the promotional examinations caused a statistically significant discriminatory impact on Spanish-speaking/surnamed officers, and that "there was no showing that any other examinees were able to pass with equal or less preparations." (R. 290).[9]

We must disagree with the ultimate findings and conclusions of the trial court. The smallness of the sample should not be grounds here for rejecting the proof. If it

[9] There was some testimony that the Chicano group assigned reading of books to certain persons and relied on review of outlines prepared by them (R. 94-95, 158-59).

were, the tendency would be to deny employees in small plants the type of protection the civil rights statutes afford. Moreover, here the inability to evaluate the test effects on a larger scale resulted in large part from the exclusion of the results of the several prior examinations. And, in any event, we feel the group tested was not too small to be evaluated as significant. See *Brito* v. *Zia Co.*, 478 F.2d 1200, 1205 (10th Cir.).

Moreover, we note that although the court found that no *prima facie* case was made it was observed that: Defendants need to improve recruitment and promotion policies in order to alleviate the underrepresentation of the Spanish minority at all levels of the department (R. 291).[10]

[10] The record in the present case reflects a statistical discrepancy between the Chicano population of Bernalillo County, and the Chicano representation in the Albuquerque Police Department. The Chicano population of Bernalillo County is approximately 39.2% (Exhibits 26, 27; R. 471, 472). The statistical breakdown of the Albuquerque Police Department as of August, 1973, based on testimony of plaintiffs' witness is approximately as follows:

	No.	%
Chicano	86	21.4
Non-Chicano	316	78.6
Total	402	100.0

(Tr. 643).

Although the Chicano population of the county is approximately 39.2%, only 21.4% of the police force is Chicano. The malapportionment becomes more significant when the police force is broken down by rank. None of the police captains are Chicano; only 4.5% of the police lieutenants are Chicano; (i.e. one out of twenty-two); 18.3% of the police sergeants are Chicano; and 31% of the patrolmen are Chicano (Exh. 13, R. 398, Tr. 641). It is apparent that the representation of Chicano within the police department as a whole diminishes at the higher rank; that the bulk of the Chicanos are employed at the lower levels. At every level of the Department, however, the Chicano population of Bernalillo County is under-represented.

In view of the facts concerning the small Chicano representation, as well as the errors which we are persuaded occurred, we are convinced we should set aside the findings and conclusions and remand for a new hearing and reconsideration.

There remains the trial court's reference to the lack of a showing that "any other examinees were able to pass with equal or less preparation." (R. 290), an apparent allusion to the testimony that outlines prepared by others, and not the text books, were studied by the Chicago officers.

We have noted no authority supporting the imposition of such a burden on the plaintiff. If the proof surrounding a test showed a lack of good faith effort by minorities to pass, we do not say this factor should be ignored. But in this case we feel the burden imposed was unjustified in connection with a showing for a *prima facie* case. Our conclusion here is re-enforced when we recall the trial court's unfavorable observations concerning the type of tests used:

> The heavy reliance placed on the achievement type test seems inequitable and misplaced. It does not go far enough in showing performance, leadership and supervisory ability. (R. 291).

It seems illogical to say the type of test was improper and at the same time to hold the *prima facie* showing of plaintiffs was defective because they did not prove that any other examinees were able to pass such tests with equal or less preparation.

Other arguments are made by the parties but we need not discuss them. What we have said shows our reasons for concluding that errors in the standing determination on the entry level issue as well as in the treatment of the promotional level proof require a retrial. Accordingly, the findings, conclusions and judgment are vacated and the case is remanded for further proceedings.

On Petition for Rehearing

This matter comes on for consideration of the petition filed by defendants for rehearing together with a suggestion that there be a rehearing en banc.

Upon consideration whereof, we conclude that the rehearing should be denied and it is ordered denied. No judge having requested a poll on the suggestion for rehearing en banc, that suggestion is denied. Rule 35(b), Federal Rules of Appellate Procedure. Our reasons follow:

First, defendants argue that the opinion is at odds with *Warth* v. *Seldin*, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343, saying that neither the Association nor the individual plaintiffs have shown injury to themselves sufficiently to meet the requirements of *Warth*, and that they may not assert the rights of third parties.

The opinion details the showing of standing we feel sufficient under *Warth*. We need only emphasize that there is an adequate showing, we feel, of a personal stake by the Association and individuals to challenge the hiring policies. *Warth*, supra at 499, 95 S.Ct. 2197. The Association, as indicated by the evidence, see note 1 of the opinion, seeks to encourage racial harmony and to discourage racism and discrimination. The underrepresentation of Chicanos on the police force, see notes 4 and 10 of the opinion, would have an obvious effect in restricting membership and resources available to the organization for furthering these purposes (Plaintiffs' Exhibit 1; affidavit of Frank Chavez, R. Vol. I, 202, stipulated into evidence subject to objections, id. at 194). The individuals make a similar showing of injury to themselves due to the effect of discrimination on the workforce. The proof was that restriction of Chicano employment by discriminatory entrance procedures weakened both the Association and individual efforts to change promotion policies (Affidavit of Frank Chavez, R. Vol. I, 202).

We are convinced that for standing purposes injury to the Association and individuals is sufficiently shown in connection with composition of the workforce, and the fact that specific harm occurs to third parties not hired does not deprive these plaintiffs of standing to vindicate their own rights. *Warth, supra* at 504-05, 95 S.Ct. 2197.

Second, defendants turn to the opinion's treatment of the trial court's ruling that a prima case was not made to challenge the promotion level procedures. In part they challenge our holding that it was error for the trial court to exclude as relevant the proof concerning the prior examinations from 1966 to 1971 (Plaintiffs' Exhibits 7-12).

Defendants say that reversal is not warranted because in addition to the relevancy objections raising the grounds of errors in tabulation, erroneous conclusions and authentication, citing record objections in Vol. VI, at 116 and 119. It is clear, however, that these other objections were directed to other exhibits, that is Exhibits 3 and 4, and not to the examinations in question (R. VI, 108, 116, 119).

Defendants argue also that even if the trial court erroneously excluded the exhibits as irrelevant,[1] there were other tenable grounds for exclusion—lack of authentication, compilation errors, et cetera, so that the ruling should not be reversed, citing Hamling v. United States, 418 U.S. 87, 108 n. 10, 94 S.Ct. 2887, 41 L.Ed.2d 590, *inter alia.*

Without considering whether such rule would apply here, this record convinces us that rejection of all the proof of prior examinations cannot be sustained here. The trial court admitted, without objection, plaintiffs' summary of the 1973 examinations, Exhibit 14, containing tabulations made apparently in the same way and by the same witness,

[1] Defendants also contend that we should presume that the exhibits were actually considered and discounted as unreliable. (See Petition for Rehearing, 13).

Mr. Chavez (R. V, 63; VI, 144), whose tabulations for the other exhibits covering the prior examinations are challenged as inaccurate, et cetera. Exhibit 14 was apparently accepted and relied on by the trial court whose findings cite Chavez' figures (R. I, 288). Thus it would be unfair here to say that the other grounds of objection to Exhibits 7-12 concerning the prior examinations—such as unreliability and the like—existed and were "tenable."

The prior examinations were not mentioned in the findings or conclusions of the trial court and there was no express ruling on the relevancy objections made. The 1973 examination was discussed in detail. We are satisfied that the exhibits concerning the earlier examinations were excluded from consideration by the trial court as irrelevant, and that this is the only tenable ground to consider in the posture of this appeal. And regardless of whether the exhibits were excluded as irrelevant, or considered unreliable and wholly discounted, we are convinced we cannot sustain the failure to give any consideration to them.